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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PETER DiFRONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Peter DiFronzo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on April 29, 1965, and made final by an order of said Court entered on May 27, 1965, denying a petition for rehearing filed by the Petitioner.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, is as yet unreported, but is printed, together with the dissenting opinion of Circuit Judge Swygert, in Appendix I hereto, *infra*, p. App. 1.

STATEMENT OF JURISDICTION

Petitioner was convicted of the unlawful interstate transportation of stolen merchandise, and of conspiracy so to do, in violation of Sections 2314 and 371, Title 18, United States Code.

The judgment of the Court of Appeals affirming the judgment of conviction was entered on April 29, 1965. A timely Petition for Rehearing was filed and was thereafter denied on May 27, 1965.

The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Where the evidence fails to establish that a defendant has any interest in or association with an interstate transportation of stolen goods, but establishes, at most, only that the defendant is involved in an intrastate shipment of stolen goods, does not a conviction for violation of Section 2314, Title 18 United States Code, and conspiracy to violate that Section deprive the defendant of Due Process of Law? Concurrently, will not this Court exercise its supervisory authority over the lower federal courts to insure that impermissible inferences are not in-

dulged to secure convictions in federal courts where there is a total failure of proof indicating federal jurisdiction?

2. Over the objection of a defendant in a criminal case, may a jury separate overnight in the midst of its deliberations on a verdict and return the following morning to continue and complete its deliberations?

STATUTES INVOLVED

The relevant portions of the statutes claimed to have been violated, Section 371 and Section 2314, Title 18, United States Code, are set forth in Appendix III, *infra*, p. App. 10.

STATEMENT OF THE CASE

Petitioner, Peter DiFronzo, was indicted with Medo Calzavara, John Torello and Anthony Daddino and charged with transporting stolen merchandise of the approximate value of $75,000 in interstate commerce, in violation of Section 2314, Title 18, United States Code, (App. 1); and conspiring to transport the same merchandise in interstate commerce, in violation of Section 371, Title 18, United States Code. (App. 1-2) Following a jury finding of guilty, Petitioner DiFronzo was sentenced to a term of ten years on the substantive count and five years on the conspiracy count; said sentences were ordered to run concurrently. (App. 10). Defendants Calzavara and Daddino were similarly sentenced. (App. 10). Following the failure of the jury to agree on a verdict as to the defendant Torello, the trial Court granted his motion for a judgment of acquittal at the close of all of the evidence. (App. 10).

Petitioner questioned, *inter alia,* in the United States Court of Appeals for the Seventh Circuit, whether the government proved a *prima facie* case as to his participation in either the substantive or conspiratorial offense charged in the indictment, and whether the jury was properly permitted to separate, over night, during its deliberations. (Opinion, Appendix I, p. App. 1)

On April 29, 1961, unidentified robbers held up two employees at a Certified Grocery warehouse in Forest View in Illinois. Certain trailers containing cigarets, razor blades and hosiery were taken in this robbery. The Government would contend, and petitioner herein would have no reason to dispute, that this merchandise was transported to a farm owned by the defendant Calzavara near Grayslake, Illinois, and there stored in a barn. (App. 14).

Part of the merchandise was recovered from a nearby farm owned by the defendant Calzavara's brother, (App. 29), a second portion was recovered from a truck which was driven to Wisconsin from Calzavara's farm by the defendant Daddino on May 2, 1961, (App. 30), and a third portion was recovered from a truck which was driven to Stone Park, Illinois, from Calzavara's farm by the Petitioner, DiFronzo, on May 2, 1961. (App. 34-35).

Prior to the aforementioned recovery of the stolen goods, agents of the Federal Bureau of Investigation had maintained a surveillance over events at the Calzavara farm. On April 30, 1961, a tractor and a trailer arrived at the farm in the early morning. (App. 14) Shortly after midnight a late model sedan pulled into the yard and an unidentified man emerged and entered the Calzavara house. Another tandem tractor arrived shortly thereafter. Sometime later the sedan and the tandem trailer left. (App. 15)

At 12:25 P.M. on May 1, 1961, a light colored 1961 Pontiac entered into the yard and drove behind trailers that were parked there. This automobile, driven by one man, left the farm at 7:56 P.M. the same day. (App. 15) At about 8:00 P.M. the Pontiac was followed from the vicinity of the farm to the Town of Grayslake, Illinois. The driver was identified as the Petitioner. (App. 36, 38)

Earlier that day, at about 5:30 P.M. the defendant Daddino had rented a "Rollem" tractor, number 504, from a company in Chicago, Illinois. (App. 33) At approximately 8:00 P.M. this vehicle was observed by the side of a road in the general vicinity of Calzavara's farm. The defendant Torello was standing on the running board. The vehicle was then driven away toward the west, followed by the 1961 Pontiac. (App. 19, 32) At approximately 8:21 P.M. the tractor and trailer, followed by the 1961 Pontiac, were observed to drive into the Calzavara farm yard. (App. 15)

At 11:53 P.M. a different tractor-trailer pulled out of a warehouse located on the Calzavara farm and turned east on the highway. F.B.I. Agents in the vicinity were alerted. At 12:11 A.M. on May 2, the 1961 Pontiac left the farm and turned east on the highway. Again the F.B.I. Agents were alerted. (App. 16) The Pontiac, containing three people, was seen to proceed in the same direction as the tractor-trailer. (App. 36) At about this time, the tractor-bearing the legend "Bar M Rodeo, Grayslake, Illinois," and pulling a silver-colored trailer, bearing the legend "Meyer Produce," was followed by F.B.I. agents from the area near the Calzavara farm to a restaurant in Wisconsin. In the vicinity of Union Grove, Wisconsin, the Pontiac, bearing Illinois license plates LC 1025, passed the trailing F.B.I. automobiles and the tractor-trailer at a high rate of speed. When the tractor-trailer stopped at the restaurant, the defendant Daddino alighted therefrom and returned to Chicago by "hitching" a ride from another truck driver, one Sylvester Schneider. (App. 30, 31) The abandoned tractor was owned by the defendant Calzavara. (App. 54)

At 5:19 that same morning, May 2, 1961, the 1961 Pontiac was observed in the Calzavara yard; the surveilling Agent had not seen it return. Approximately twenty minutes later three men drove the Pontiac east from the farm. (App. 17-18) Minutes later a dark tractor pulling a large aluminum trailer left the farm and proceeded west. F.B.I. Agents in the vicinity were alerted. (App. 18) Two F.B.I Agents followed this vehicle which was driven by Petitioner DiFronzo. (App. 34) The tractor trailer stopped near a snack shop in Stone Park, Illinois, and the driver, DiFronzo, was apprehended as he fled from the scene. (App. 34-35, 37) The tractor-trailer bore the name "Rollem" and number 504. (App. 38)

Other trucks and passenger vehicles were observed to enter and leave the Calzavara property during the period of surveillance. (App. 14-18)

Approximately $70,000 worth of property was recovered in Wisconsin, $70,000 worth of property was recovered in Stone Park, Illinois, and $14,000 worth of property was recovered from Calzavara's brother's farm. Approximately $5,000 worth of property was not recovered. (App. 41-42)

Petitioner's Motions for Judgments of Acquittal at the close of the Government's case and at the close of all of the evidence were denied. (App. 43, 62)

After closing arguments and the charge to the jury, the following colloquy took place between the trial court and counsel:

> "The Court: No, my instructions to the Marshal then would be to advise me, permit the jury to continue with its deliberations until I return, which would be 10:30 or thereabouts, at which time I would instruct them as to their duties and let them return to their homes to resume their deliberations tomorrow morning.
>
> "This is the standard practice in the court at this time and I will follow it . . ."
>
> * * *
>
> "Mr. Callaghan: I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing

upon a sealed verdict which would be signed, sealed and delivered on Monday morning, but I would have an objection the jury separating.

"The Court: This is standard practice, Mr. Callaghan, and I am going to do it." (Supp. App. Cal., p. 7; Supp. Tr. 7).[1]

* * *

At 11:10 that evening, the jurors advised the trial judge that they needed additional time to deliberate. The court admonished the jurors not to discuss the case overnight, and then excused them for the night, permitting them to separate until 10:00 o'clock the following morning when they were to return for further deliberations. (Supp. App. Cal., p. 7).

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[1] Contained in Reply Brief for Medo Calzavara.

REASONS FOR GRANTING THE WRIT

I.

A conviction of a federal crime in the federal court system based upon an absolute lack of evidence must be repugnant to the Fifth Amendment to the Constitution. This Court has, in recent years, decided that a conviction in a state court which does not rest upon any evidence of guilt violates the Due Process clause of the Fourteenth Amendment. *Thompson* v. *City of Louisville,* 1960, 362 U.S. 199, 80 S. Ct. 624; *Garner* v. *Louisiana,* 1961, 368 U.S. 157, 82 S. Ct. 248. In years past the Court has suggested that identical standards avail in the federal system, and that a conviction there, without evidence, offends the Fifth Amendment. See, *Tot* v. *United States,* 1943, 319 U.S. 463, 63 S. Ct. 1241. The Court has not, however, stated explicitly that the *"Thompson"* and *"Garner"* doctrine has equal application in the federal system. While it would be unrealistic to assume that the doctrine of these two state cases does not apply in the federal system, this case presents the Court with the opportunity to apply the constitutional standard explicitly to the federal courts. Not as an alternative, but as a supplement to the consideration of whether a conviction based upon a lack of evidence violates due process, this Court's supervisory authority over the lower federal courts, which "implies the duty of establishing and maintaining civilized standards of procedure and evidence," (*McNabb et al.* v. *United States,* 1943, 318 U.S. 332, 340-341, 63 S. Ct. 608, 613), should be exercised to insure that impermissible inferences are not indulged to secure convictions which cannot be justified by the evidence.

The evidence against Petitioner below consisted of two related facts. Viewed in the light most favorable to the Government, this evidence shows that Petitioner transported stolen goods from Grayslake, Illinois, to Stone Park, Illinois, during the early morning hours of May 2, 1961. Prior to this, on May 1, 1961, he drove a 1961 Pontiac from the defendant Calzavara's farm, in Illinois, to a location nearby, also in Illinois, where the truck which he later used to transport the merchandise to Stone Park, Illinois, was parked; from that point he followed the vehicle back to Calzavara's farm. Not one fact suggests that Petitioner participated in any manner or degree in the interstate transportation of goods to Wisconsin. The Pontiac, which Petitioner was seen driving on May 1st, was observed following the truck driven by Daddino in Wisconsin on May 2nd. Three persons, not one of whom was identified as the Petitioner, were in that car. That same Pontiac, again occupied by three men other than the Petitioner, left the Calzavara farm only minutes before Petitioner left, in the truck, for Stone Park, Illinois. As a result of this non-exclusive relationship between Petitioner and the Pontiac, there can be no inference that it was Petitioner who followed Daddino to Wisconsin. Circuit Judge Swygert recognized this in his dissenting opinion below. He said:

> "The only evidence which might remotely relate DiFronzo to the violations of which he was found guilty is testimony to the effect that at one time he was seen riding in a Pontiac automobile which at a later time was found to be following the truck making the interstate transportation of the stolen goods. DiFronzo was not in the automobile at the time it was observed to be following the truck from Illinois to Wisconsin. Rather, he was found in another truck transporting stolen goods from one point in Illinois

> to another place in the same state. Moreover, there was no showing that DiFronzo owned the Pontiac or had any participation in its use interstate." (Opinion, Appendix I, *infra,* p. App. 7.)

Moreover, Judge Swygert was on sound ground in rejecting any "remote" inference that DiFronzo was in the Pontiac which followed Daddino. While the existence of a fact essential to guilt is permitted to be inferred from another, if reason and experience support the inference, the inference must be rejected where there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot* v. *United States,* 1943, 319 U.S. 463, 467-468, 63 S. Ct. 1241, 1245. So in the present case, it is unreasonable and arbitrary to infer that Petitioner was in the Pontiac on May 2nd, because he was in it on May 1st.

Undoubtedly recognizing that any inference that Petitioner was physically involved in the interstate transportation to Wisconsin on May 2nd was constitutionally and logically impermissible, the Government and the courts below relied upon a theory of vicarious liability. Accordingly, the trial court, in charging the jury as to the substantive count, instructed the jury on the "aider and abettor" theory. (Supp. App. DiFronzo, p. 15).[2] This Court has sanctioned the language of Judge Learned Hand in *Peoni* v. *United States,* 2 Cir., 100 F. 2d 401, 402, to the effect that,

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as

[2] Contained in Brief and Supplemental Appendix for Peter DiFronzo.

> in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen v. United States*, 1949, 336 U.S. 613, 619, 69 S. Ct. 766, 769-770.

Applying these standards, it is again apparent that the Petitioner could not be convicted as an aider and abettor. The evidence failed to show that the Petitioner had the slightest interest in the goods which moved interstate. It showed that he was interested in goods which moved intrastate, but his interest in these goods did not and could not affect the interstate shipment. The tractor-trailer which Petitioner "escorted" to the Calzavara farm did not move in interstate commerce; it was the truck which Petitioner used in his intrastate transportation. Petitioner's presence at the Calzavara farm, aside from being explained by his obvious interest in the truck and goods which he transported to Stone Park, Illinois, provided no logical basis for assuming that Petitioner had any interest in the interstate shipment. The evidence unerringly demonstrates that the farm was merely a distribution center where parties, otherwise disinterested in each other, could obtain stolen merchandise. Several cars and several trucks not specifically identified entered and left the farm premises during the period between April 30, 1961, and May 2, 1961. (App. 18) In addition, a tandem trailer left the farm shortly after midnight on May 1st (App. 15), another trailer, pulled by a "Rollem" tractor, left the farm at 1:10 A.M. on May 2nd and was abandoned in the City of Chicago later that morning (App. 34); a third truck, driven by Calzavara and carrying large cardboard cartons, left the farm premises at 2:20 A.M. on May 2nd (App. 170); shortly thereafter a fourth truck, also carrying cardboard boxes which had been loaded into it at the farm, left the premises. (App. 17) None of these vehicles were shown to have travelled interstate. Only the tractor-trailer driven

by Daddino travelled interstate. There is no evidence from which it can be inferred that any party had any interest in any merchandise which left the farm, other than such merchandise which he personally transported.

Paraphrasing *Peoni*, there is no evidence from which it can be inferred that the Petitioner associated himself with the transportation of goods to Wisconsin, or that he participated in it as something he wished to bring about, or that he sought by his actions to make it succeed. The evidence showed only that Petitioner's actions and associations were all centered about the intrastate transportation to Stone Park and the vehicle which was used in that transportation. Circuit Judge Swygert concluded:

> "The Government has been unable to point to any evidence which might link DiFronzo with the interstate offenses charged. His actions tended to show a participation only in an intrastate transportation of stolen items. There is no evidence to show that he conspired in planning the interstate activity or that he aided and abetted in the conduct thereof. Although his activity might well warrant a conviction in a state criminal proceeding, it is not a proper basis for prosecution under the federal statutes. Accordingly, the evidence fails to sustain the verdict against this defendant." (Opinion, Appendix I, p. App. 8)

As indicated above by Circuit Judge Swygert, what has been said herein with respect to the total lack of proof concerning the substantive charge applies with equal vigor to the conspiracy charge. Conspiracy imports a "concert of purpose" (See, *Blumenthal* v. *United States*, 1947, 332 U.S. 539, 558-559, 68 S. Ct. 248, 257; *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401, 403), and the Record is devoid of any evidence showing a common interest between Daddino and Petitioner to transport merchandise to Wisconsin.

The real gravamen of Petitioner's complaint and request that this Court notice his cause lies in the fact that the element which has not been proven is the essential element for purposes of federal jurisdiction. Without proof of interstate transportation the federal government has no legitimate concern, consistent with the Ninth Amendment, in Petitioner's activities. The Government cannot point to one fact in the Record showing an association between Petitioner and Daddino's interstate transportation of stolen merchandise. It must ask that guesswork be indulged in so that Petitioner may be identified as one of the persons interested in Daddino's interstate transportation of the stolen goods. But, as Circuit Judge Swygert recognized below and as this Court intimated in *Tot* v. *United States*, 1943, 319 U.S. 463, 63 S. Ct. 1241, evidence of essential elements cannot be supplied by inference where there is no rational connection between the fact proved and that sought to be inferred. If such inferences were permitted, due process would be denied. See, *Luria* v. *United States*, 1913, 231 U.S. 9, 25, 34 S.Ct. 10. If such inferences were permitted, the entire concept that "* * * a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged," would be destroyed. (See, *Tot* v. *United States, supra*, 319 U.S., at page 473, 63 S.Ct., at page 1248 [concurring opinion].) And, as demonstrated by the instant case, the present distinction between crimes recognizable by the states only and crimes recognizable by the federal authorities vanishes in the wake of an inference that permits a purely intrastate transaction to be converted into an interstate offense. The Court is urged to correct this situation.

II.

On February 9, 1965, the United States Court of Appeals for the Seventh Circuit ruled that juries in criminal cases,

once they have started their deliberations, may not separate overnight, to their homes, then to resume their deliberations in the morning, over the objection of the defendants. *United States* v. *D'Antonio*, 7 Cir., 342 F. 2d 667.[3] In a well reasoned opinion, one judge dissenting, the Court held that the historical right of a defendant to have his case decided "by a jury whose secret *deliberations* are not interrupted by the court's order permitting them to *separate* before a verdict has been reached," (342 F. 2d at page 669) was to be enforced in the Seventh Circuit. In the instant case, decided not one month after the petition for rehearing in *D'Antonio* was denied, the court below refused to apply the rule laid down in *D'Antonio*. Instead the court held:

> "• • • the record discloses that the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge • • • [in permitting the jury to separate.]" (Opinion, Appendix I, p. App. 2)

As an aside, the court added in a footnote that the defendants did not claim that the separation resulted in anything to their prejudice.

Petitioner Di Fronzo respectfully submits that the opinion of the court below, insofar as it states that the defendants agreed to the separation of jurors, is in error. The Record clearly and explicitly shows that, after the trial court announced that it proposed to allow the jurors to separate for the night if they failed to arrive at a verdict by 10:30 P.M. and then permit them to resume their deliberations the following morning, Mr. Callaghan (trial counsel for Petitioner Di Fronzo), addressed the court as follows:

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[3] A Petition for Rehearing filed by the Government was denied, *en banc*, on April 9, 1965.

> "I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, *but I would have an objection* [*to*] *the jury separating.*
>
> "The Court: This is a standard practice, Mr. Callaghan, and I am going to do it." (Supp. App. Cal., p. 7; Supp. Tr., p. 7).[4] (Emphasis added.)

Counsel could hardly have been more emphatic in his objection, and the trial court could not have expressed clearer recognition of the objection.

In view of the Seventh Circuit's discussion in *D'Antonio,* which suggested that the historical right to contain the jury during its deliberations was well founded on considerations of secrecy and immunization from outside influences during a critical stage in the proceedings, it is difficult to comprehend the lower court's footnote claim that the defendants did not demonstrate actual prejudice. Nor did D'Antonio. It would be almost impossible to demonstrate prejudice. But in these days of television and newspaper saturation coverage, it is not unreasonable to assume, as the Seventh Circuit originally did in *D'Antonio,* that the proscription against separation is a prophylactic devise which recognizes and admits of the existence of prejudice *per se.*

This Court should grant the writ requested, not only to review and correct the misstatement of the record by the court below, but to exercise its supervisory authority over

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[4] Contained in Reply Brief for Medo Calzavara, p. 7.

and decide a problem in federal criminal procedure which is sure to cause conflict in the various circuits in the future.[5]

CONCLUSION.

For the above and foregoing reasons it is prayed that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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On the Brief.

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[5] The statement of facts contained in the opinion in *United States* v. *D'Antonio*, 7 Cir., 342 F.2d 667, 668, indicates that the trial judge there had been advised that separation was being permitted "all over the United States" except in the State of Illinois, and that the District Courts in Illinois were beginning to follow the practice throughout the rest of the country. The trial judge in the instant case, while not as explicit, indicated that separation was, or had become, "a standard practice." (Supp. App. Cal., p. 7) The opinion in *D'Antonio*, of course, indicates that the practice is not widespread.